73-7032

JUL 9 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

BILLY HONEYCUTT,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered on April 10, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 285 N.C. 174, 203 S.E.2d 844 (1974), and is set out in Appendix A hereto, pp. 1a-6a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on April 10, 1974, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the Sixth or Fourteenth Amendment to the Constitution of the United States requires that a transcript be made of the voir dire examination of prospective trial jurors in a capital case, so as to assure a record of sufficient completeness to preserve an indigent defendant's rights against unconstitutional methods of jury selection such as those condemned by Witherspoon v. Illinois, 391 U.S. 510 (1968)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be commited in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. 1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

§ 15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

§ 15-188. Manner and place of execution.-The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governer and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 10, 1974, affirming petitioner's conviction and death sentence. Petitioner, Billy Honeycutt, an indigent white man, was sentenced to die on October 3, 1973, in the Duplin County Superior Court upon conviction for the first degree murder of his wife, Mrs. Brenda Honeycutt. 2/

2/ Petitioner's sentence of death was imposed under N.C.Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), on April 8, 1974 which imposes the death penalty for first degree murder, but this statute provides that it is applicable to offenses committed after its ratification.

Petitioner was a salaried employee on a chicken farm and lived in a trailer on the farm with his wife and two daughters. His employer, J. D. Sheppard, testified that petitioner and his wife had separated about two or three weeks before the murder, that he had occasionally heard the Honeycutts arguing, and that petitioner "was a dependable worker but did drink once in a while whenever he became depressed." R. 7. On May 25, 1973, petitioner, who had been drinking, told his employer that his wife had locked him out of the trailer and declared, "I'm going to go over there and tear the door off and kill the damn bitch." R. 6. Petitioner called the sheriff's office, however, and a deputy came. Petitioner asked him to open the trailer door else "something . . . . . was going to happen" R. 10 (omission in original), but the deputy refused and gave petitioner a ride away from the chicken farm to his mother's house, where petitioner was then living.

A friend of petitioner's, Durwood Rouse, testified that about a week before the death of Mrs. Honeycutt, petitioner had declared, "I love my wife good enough to kill her," R. 6, although this witness testified that petitioner said this in a "joking way" and that he did not believe petitioner was "mad at his wife when he said it." Ibid. Another friend of petitioner's, Thomas Rouse, testified that about two weeks prior to Mrs. Honeycutt's death, petitioner, who had been drinking a great deal, told him he was having "family problems," R. 9, and that he was going to kill his wife, his employer, and

"Bobby."[3] Petitioner repeated this threat to Thomas Rouse on the night of June 5, 1973,[4] and declared that he "thought his wife was seeing a man that worked in the turkey house" and that he "wanted to go back to his wife but she would not take him back." R. 9.

Late on the evening of June 5, 1973, petitioner prevailed upon a friend, Richard Rouse, to drive him to his trailer, stating that he "wanted to go back to" his wife, that he loved his family, and that "nothing didn't take the place of family."[5]

3/ The record does not reveal exactly who "Bobby" is, although the trial transcript is significantly more informative than the Statement of Case on Appeal. (The Court is familiar with the North Carolina practice of "narrating" the transcript on appeal. See Bumper v. North Carolina, 391 U.S. 543, 546, n. 8 (1968).) The Case on Appeal attributes to Thomas Rouse the statement that "Billy Honeycutt told Mr. [Thomas] Rouse he was going to kill his wife, Bobby and Mr. Sheppard." R. 9. The trial transcript indicates that the witness in fact testified that "[petitioner] said that he wanted to come back to her. Said he was going to kill her, he was going to kill Bobby that works down there and Mr. Sheppard." Transcript, State v. Honeycutt, Duplin County Superior Court No. 73-Cr-3822 (Oct. 2, 1973) at 51. The trial transcript also reveals that Thomas Rouse testified that petitioner "thought she was running out with some men up there at the egg house" and that "he thought she was going with that Bobby that works in the turkey house there." Id. at 53, 53-54.

4/ Thomas Rouse testified that he did not think petitioner was serious when he made his statements about killing people. Transcript, note 3, supra, at 55.

5/ Transcript, note 3, supra, at 59. Cf. R. 10.

Richard Rouse warned petitioner that he did not want to cause any trouble by bringing petitioner to his wife, and petitioner assured him there would be no trouble. This witness saw petitioner enter the trailer, and a few minutes later petitioner signalled him that he could return home. He heard no signs of violence before he left.

Petitioner's daughter, Billie Jean Honeycutt, whose ninth birthday occurred on June 6, 1973, testified that she was asleep on the night of June 5-6, and that sometime during the night her father entered and awakened her by calling her mother "ugly names," R. 13, and by declaring: "If I can't have you, no man can." Ibid. She saw her father lock the front door and take the door knob off the back door. She testified that her parents continued to argue and that her father took a "butcher knife," id., from a drawer, 6/ concealed it in his pants, and then stabbed her mother in the back with it. Her mother said, "Billie Jean, go get help," id., and Billie Jean ran to J.D. Sheppard's house.

6/ On direct examination, this witness declared: "I heard [petitioner] open up the drawer and he got the fork out and then he got the butcher knife out. He put the butcher knife in his pants, sort of like that . . . . I didn't see him get the butcher knife, but I know he got it, I know where he put it." Transcript, n.3, supra, at 102. On cross examination, the witness stated that she did not see petitioner pick up the knife ("I thought he had the knife because, I just thought he had the knife," id. at 113), but that she did see him pull it out of his pants. Ibid.

J. D. Sheppard testified that shortly after midnight on June 6, 1973, he was awakened by Billie Jean Honeycutt and that a few minutes later, petitioner, who appeared sober, came to the door and told him "that he had stabbed his wife several times and that he thought she was dead." R. 7. Petitioner then asked that Sheppard take Mrs. Honeycutt to the hospital at Kinston. 7/ A deputy sheriff arrived shortly and placed petitioner under arrest. This deputy testified that petitioner inquired about his wife's condition and upon being told that she was dead, replied, "Ha, I'm damn glad of it." R. 11. This officer asked petitioner where the knife was, and petitioner replied that it was behind the television set, where the police subsequently discovered it. 8/

7/ Mrs. J. D. Sheppard confirmed this account, R. 7-8, adding that she heard petitioner say, "Where is that little white headed bitch?", referring to his daughter, when he came to the Sheppard house. R. 8.

8/ Petitioner testified in his own defense that he had "family problems," R. 15, with his wife "because of the fact that he was not making enough money and wanted a better job." Ibid. He stated that he went to the trailer on the early morning of June 6 "in a desperate attempt to talk with Brenda Honeycutt and try to make her see how much he loved her and wanted to make her a good husband." Ibid.

> "She told him that she did not ever intend to live with him again and that she was going to take his kids away and make sure that he did not see them again. His wife came out of the kitchen with a knife in her hands. He tried to take it away from her and a struggle followed. His child started screaming at him. He did not remember stabbing his wife. He only remembered seeing her on the floor." R. 15-16.

He admitted that he drank alcoholic beverages "on frequent occasions." R. 16.

Petitioner was determined to be indigent and was defended by court-appointed counsel at his trial. During the selection of the jury, the veniremen were examined on voir dire concerning their conscientious and religious scruples against the death penalty. This examination was not recorded, although the questions asked on voir dire were stipulated in the Statement of Case on Appeal (see note 3, supra) in the Supreme Court of North Carolina. 9/ The veniremen's answers to these

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9/ "It is stipulated and agreed by counsel for the defendant and the solicitor for the State, that the following questions are true and accurate questions asked by the State in the selection of the jury that tried Billy Honeycutt.

1. Do you have any moral or religious scruples about capital punishment?

2. On account of these moral or religious scruples, would it be impossible, under any circumstances, and in any event, for you to return a verdict of guilty as charged even though the State proves the defendant guilty beyond a reasonable doubt?

3. Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop at the trial?

4. You would not vote in favor of the death penalty under any circumstances, no matter how aggravated the case was and no matter what the facts were?

It is further stipulated and agreed that no objections were interposed at the time the above questions were asked the jury during the jury selection of this case. It is further stipulated and agreed that the defendant did not exhaust his peremptory challenges to the jury in the jury selection in this case."

R. 2-3.

questions were not stipulated, nor was it stipulated whether any veniremen were excluded for cause on the basis of their answers, although the briefs of both parties in the Supreme Court of North Carolina assumed that such exclusions had occurred.

At the conclusion of the evidence, the court instructed the jury that it could return a verdict of not guilty, guilty of involuntary manslaughter, guilty of second degree murder, or guilty of first degree murder. The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die.

On April 10, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting in regard to the death penalty. On April 23, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner's Grouping of Exceptions and Assignments of Error (R. 44-45) in the Record on Appeal assigned as error the death sentence in this case because "the death penalty constitutes cruel and unusual punishment which is prohibited by the Eighth Amendment of the Constitution of the United States of America made incumbent by the States by application of the due process clause of the Fourteenth Amendment of the United States Constitution." (Assignment of Error No. III, R. 45). The Supreme Court of North Carolina rejected this contention on the merits, citing its decisions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974).[10/] 203 S.E.2d at 848-849 (App. A. at 5a-6a).

10/ A dissenting opinion stated: "BOBBITT, C.J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, N. C. 202 S.E.2d 721 (1974)." 203 S.E.2d at 849 (App. A at 6a).

2. Petitioner assigned as error in the Record on Appeal "the state's challenge for cause of jurors who had conscientious objections to capital punishment and who stated that their objection to capital punishment would not allow them to return a guilty verdict in this case." (Assignment of Error No. I, R. 45). Petitioner specifically excepted to the stipulated questions asked on voir dire concerning conscientious and religious scruples against capital punishment. R. 3. The Supreme Court of North Carolina noted that "[t]his record does not disclose the answers given by any juror" to the questions concerning conscientious and religious scruples against capital punishment and that it does not "reveal that any juror was excused for cause because of his opposition to capital punishment." 203 S.E.2d at 847 (App. A at 4a). The Court thereupon found that the record showed no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Ibid.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at pp. 11-51, and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

Since the Dillard certiorari petition was filed on June 11, 1974, 18 additional persons have been sentenced to die in this country, making a national total of 121 defendants presently condemned to death as a result of a sentence imposed subsequent to the date of the Furman decision. In North Carolina, 12 additional persons have been sentenced to die under the procedures approved in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), making a total of 41 persons now under sentence of death in North Carolina. 11/

11/ The following death sentences should be added to those listed in footnote 28, pp. 29-31, of the Dillard petition: State v. Stegmann, Cumberland County Superior Ct., No. 73-Cr-30527, 73-Cr-30615 (May 16, 1974); State v. Gordon, Mecklenburg County Superior Ct., No. 73-Cr-56187, 73-Cr-56188 (May 29, 1974); State v. Robbins, Guilford County Superior Ct., No. 74-Cr-19674, 74-Cr-19771 (May 31, 1974); State v. Thompson, Rutherford County Superior Ct., No. 74-Cr-1222 (June 1, 1974); State v. Foddrell, Caswell County Superior Ct., No. 73-Cr-1439 (June 7, 1974); State v. Rozell Hunt, Anson County Superior Ct., No. 74-Cr-1538 (June 13, 1974); State v. Lowery, Alamance County Superior Ct., No. 73-Cr-8718 (June 13, 1974); State v. Simmons, Nash County Superior Ct., No. 74-Cr-194 (June 13, 1974); State v. Fernando Hunt, Vance County Superior Ct., No. 74-Cr-550, 74-Cr-551, 74-Cr-552 (June 14, 1974); State v. Davis, Lenoir County Superior Ct., No. 74-Cr-1102, 74-Cr-1103 (June 16, 1974); State v. Foster, Lenoir County Superior Ct., No. 74-Cr-1248, 74-Cr-1249 (June 16, 1974); State v. Strickland, Onslow County Superior Ct., No. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974).

Since June 11, 1974, the Supreme Court of North Carolina has vacated death sentences in State v. Anthony Carey, __N.C.___, ___S.E.2d __, North Carolina Supreme Court No. 16 (Mecklenburg) (July 1, 1974) and in State v. Albert Carey, __N.C.__, __S.E.2d __, North Carolina Supreme Court No. 19 (Mecklenburg) (July 1, 1974) and has remanded these cases for new trials.

There is sometimes a delay between imposition of a sentence of death and commitment of the condemned prisoner to Death Row in Central Prison, Raleigh, North Carolina. This delay accounts for the fact that some of the sentences listed supra were imposed before June 11, 1974, the date the Dillard petition was filed.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE AN INDIGENT DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION SUCH AS THOSE CONDEMNED BY WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner was tried in forma pauperis on a capital charge. At his trial, no transcript was made of the voir dire examination of prospective jurors, although the jurors were interrogated concerning their conscientious and religious scruples against capital punishment. A stipulation was later entered as to the form of the questions asked each veniremen,[12/] but the record does not reveal the responses of the prospective jurors to these questions nor whether other questions were asked them on voir dire. Petitioner assigned as error in the Supreme Court of North Carolina the trial court's allowance of "the State's challenge for cause of jurors who had conscientious objections to capital punishment and who stated that their objection to capital punishment would not allow them to return a guilty verdict in this case." R. 44-45. The record does not reveal whether or how many veniremen were excluded for cause on that ground nor the precise bases of their exclusion.

12/ See note 9, supra.

In Witherspoon v. Illinois, 391 U.S. 510, 522 n.21, 515 n.9 (1968), this Court ruled that a death sentence cannot be carried out unless the record makes it "unmistakably clear" and "unambiguous" that the selection of the jury meets the minimum standards of Witherspoon. See also Boulden v. Holman, 394 U.S. 478, 482 (1969); Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971). The Court held that:

> "If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that countenanced by Witherspoon] . . . the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion."

Witherspoon v. Illinois, supra, at 522 n.21. The Court has accordingly reversed death sentences, citing Witherspoon, where no record of voir dire was made, Mathis v. Alabama, 403 U.S. 946 (1971), rev'g 283 Ala. 308, 216 So.2d 286 (1968), and where the court reporter's voir dire notes had not been transcribed and made part of the appellate record. Funicello v. New Jersey, 403 U.S. 948 (1971), rev'g State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).

The question which this Court should now resolve is whether any alternative to an actual transcript of voir dire testimony can provide an adequate record for the resolution of an indigent capital defendant's claim that veniremen were excluded on a "broader basis" than that countenanced by Witherspoon. Petitioner contends that the nature of a condemned defendant's

Witherspoon claim, depending as it does on the responses of each juror interrogated and excluded on the voir dire, clearly establishes "a colorable need for a complete transcript" and that "the burden . . . [is therefore] on the State to show that only a portion of the transcript or an 'alternative . . . '[will] suffice." Mayer v. City of Chicago, 404 U.S. 189, 195 (1971).

The necessity of an actual voir dire transcript for resolving claims that capital trial jurors were improperly excluded because of their sentiments concerning the death penalty has been recognized by a number of courts. See, e.g., Garrison v. Patterson, 405 F.2d 696 (CA10 1969);[13/] United States ex rel. Weston v. Sigler, 308 F.2d 946, 947 (CA5 1962); State v. Pinkney, Crim. No. 2490 (Cir.Ct. of Palm Beach, Fla., July 9, 1971) ("Justice requires that the failure to properly record the proceedings be weighted against the State of Florida, and not against the indigent defendant.") Cf. Evans v. State, 430 S.W.2d 502, 505 (Tex. Ct. Crim.App. 1968). Subsequent to Mathis v. Alabama, supra, the Supreme Court of Alabama held that in order to determine whether the requirements of Witherspoon were met, a transcript must be kept of the portion of the voir dire proceedings pertaining to the qualification of jurors concerning capital punishment:

> "This Court is of the opinion that it is implicit in the Witherspoon holding that a

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13/ "The Federal District Court did not have an opportunity to consider the jury voir dire necessary to determine the Sixth Amendment issue raised [the permissibility of excluding for cause jurors with conscientious and religious scruples against the death penalty], nor does the record or transcript available to us contain the voir dire examination. It is necessary to review such a transcript before the court can determine the Sixth Amendment question. We cannot therefore

> full and complete transcript adequate for the purposes of appellate review must contain the proceedings incident to the selection and qualification of the jurors pertaining to capital punishment. Therefore, in order to determine whether the requirements of Witherspoon are met, neither this Court nor the trial courts should give force to any statutory authority, rule of court, or prior decision of this Court which would authorize the omission from the transcript of that portion of the proceedings pertaining to the qualification of jurors concerning capital punishment."

Edwards v. State, 287 Ala. 588, 253 So.2d 513, 520 (1971).[14]

The practice of stipulating the question asked veniremen on voir dire, as a basis for justifying exclusions for cause on the ground of conscientious or religious scruples against the death penalty, will not pass muster under Witherspoon for a number of reasons. First, a summary of the questions asked ignores crucial features of a Witherspoon claim:

13/ cont'd.

say that the test established by [Witherspoon v. Illinois] has been applied nor can the district court determine whether the principles of the Witherspoon decision were violated. We therefore remand to the trial court . . . ." 405 F.2d at 698 (footnote omitted).

14/ In Liddell v. State, 287 Ala.299, 251 So.2d 601, 612 (1971), the Alabama Supreme Court reemphasized its requirement that "[t]he trial court should . . . make certain that the court reporter takes full notes from which a transcription can be made of the examination of the jurors relative to qualifying them." See also Beecher v. State, 288 Ala. 1, 256 So.2d 154, 165-166 (1971), rev'd on other grounds, 408 U.S. 234 (1972). Strong v. State, 47 Ala. App. 238, 252 So.2d 659 (1971). Pilkington v. State, 46 Ala. App. 716, 248 So.2d 755, cert. denied, 287 Ala. 739, 248 So.2d 757 (1971).

> "[t]he critical question[. . .] is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood - or misunderstood - by prospective jurors. Any 'layman . . . (might) say he has scruples if he is somewhat unhappy about death sentences . . . . (Thus) a general question[. . .] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.'"

Witherspoon v. Illinois, supra, at 515 n.9. The practice followed here ignores the necessarily factual underpinnings of a Witherspoon claim. An abstract summary of questions asked does not reveal the views of an individual juror with the specificity necessary to make it "unmistakably clear," id. at 522 n.21, that he was properly excluded for cause, because such a summary does not convey the nuances and uncertainties which well might qualify an affirmative answer. It is not even clear whether any veniremen excluded for cause gave affirmative answers to all of the four questions asked. 15/

15/ The absence of veniremen's answers from this record is exacerbated by the misleading nature of some of the stipulated questions, unless these questions are qualified by further examination. For example, each venireman was asked whether it would be impossible for him to return a verdict of guilty even though "the State proves the defendant guilty beyond a reasonable doubt?" Question 2, R. 2-3. In Witherspoon, the Court clearly stated that "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." 391 U.S. at 522 n.21. On this record, it is simply impossible to tell how veniremen understood the import of Question 2. Furthermore, the stipulation indicates that petitioner did not object to the four questions when they were asked and that petitioner had peremptory challenges remaining at the end of jury selection. Neither of these facts bars the raising of Witherspoon claims on appeal, however, since this Court has reversed death sentences where a defendant has not objected to exclusions, has not inquired further concerning the attitudes of excluded veniremen, and has not expressed dissatisfaction by exhausting his own peremptories. See, e.g.,

This Court has vacated death sentences for Witherspoon error, despite the finding of a state appellate court that the "atmosphere" of voir dire was consistent with Witherspoon standards, Speck v. Illinois, 403 U.S. 946, rev'g 41 Ill.2d 177, 242 N.E.2d 208 (1968), that a trial judge had conscientiously tried to follow Witherspoon, Pruett v. Ohio, 403 U.S. 946 (1971), rev'g 18 Ohio St.2d 167, 248 N.E.2d 605 (1969), and that the "spirit" of Witherspoon was not violated, Aiken v. Washington, 403 U.S. 946, rev'g 75 Wash. 421, 452 P.2d 232 (1969).

Second, the stipulation of questions here does not clearly indicate whether veniremen who may have been excluded for cause from the panel were properly instructed as to their duty to subordinate their personal views to the commands of the law as explained by the court. As the Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that

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15/ cont'd.

Pruett v. Ohio, 403 U.S. 946 (1971), rev'g 18 Ohio St. 2d 167, 248 N.E.2d 605 (1969); Wigglesworth v. Ohio, 403 U.S. 947 (1971), rev'g 18 Ohio St.2d 171, 248 N.E.2d 607 (1969); Harris v. Texas, 403 U.S. 947 (1971), rev'g 457 S.W.2d 903 (Tex.Cr. App. 1964); Quintana v. Texas, 403 U.S. 947 (1971) rev'g 441 S.W.2d 191 (Tex.Cr.App. 1970); Whan v. Texas, 403 U.S. 946 (1971), rev'g 438 S.W.2d 9 (Tex.Cr.App. 1969).

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403 U.S. 946 (1971), rev'g State v. Hudson, 253 La. 992, 221 So.2d 484 (1969).

Fourth, the requirement that the voir dire of prospective jurors be recorded and transcribed imposes no significant burden on the State, since voir dire in North Carolina is frequently recorded and transcribed with the remainder of the trial testimony. Capital defendants are often indigent and thus unable to hire a reporter to record and transcribe the voir dire hearing. Furthermore, six years of experience with Witherspoon has surely afforded the States sufficient experience with Witherspoon issues to give notice of the importance of a complete transcript.

Fifth, the procedure followed here violates the presumption that, where an appeal is provided, a transcript should be afforded to an indigent appellant as a matter of due process and equal protection unless for some reason it is impossible to do so. Griffin v. Illinois, 351 U.S. 12 (1956). This Court has recognized that in many instances the practice of relying on the memories of participants at a trial may not provide a record of sufficient completeness for review purposes where better evidence is available. See,e.g., Draper v. Washington, 372 U.S. 487 (1963); In Long v. District Court of Iowa, 385 U.S. 192, 194-195 (1966), the Court indicated a preference for transcripts as opposed to other accounts of trial proceedings:

> "The State suggests that there may be alternative ways of preparing, for purposes of appeal, an account of relevant proceedings at the trial level . . . . In the present case a transcript is available . . . . We need not consider a possible situation where a transcript cannot reasonably be made available . . . ."

Denial of an adequate transcript in the circumstances of this case is itself a denial of due process of law and the equal protection of the laws. See Boykin v. Alabama, 395 U.S. 238, 242-243 (1969); Carnley v. Cochran, 369 U.S. 506, 516 (1962). Cf. Brookhart v. Janis, 384 U.S. 1 (1966).

Finally, since by definition the Witherspoon issue involves a matter of life and death, any doubts as to the legitimacy and sufficiency of a practice that affects the ability of a condemned defendant to adequately raise an issue which might save his life must be resolved in favor of the condemned defendant. "What is at stake for an accused facing death . . . demands the utmost solicitude of which courts are capable." Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). Such a demand is consistent with the frequently expressed principle that courts treat cases involving the death penalty with extraordinary care to insure that all proper procedures have been followed and that no error has occured in the trial. Furman v. Georgia, 408 U.S. 238, 287 n.34 (1972) (Brennan J. concurring); Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan J. concurring); Andres v. United States, 333 U.S. 740, 752 (1948). "The magnitude of a decision to take a human life is probably unparalleled in the human

experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 32 (CA5 1971), cert. denied 402 U.S. 906 (1971); therefore, "doubts concerning the ability of a veniremen to subordinate his personal views to his oath as juror to obey the law of the state should be resolved against exclusion." Id. at 31. Placing the burden of providing and preserving a record of voir dire testimony on the State is clearly warranted by the nature of the right at stake - which is no less than life itself - and by the respective positions of the parties.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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Ch. 426 of the Session Laws of 1953, provides:

"(A) city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise *outside its corporate limits*, within reasonable limitations. . . ." (Emphasis added.)

The predecessor of this statute, G.S. § 160-255, authorizing a municipality to render light, water, sewer and gas services outside its corporate limits, was in effect until replaced by G.S. § 160A-312, as set forth in Ch. 426, Session Laws of 1953. Nothing in the legislative history of this statute indicates a legislative intent completely to deprive municipal corporations of the authority to serve new users outside the corporate limits.

On the other hand, "it is equally clear that without legislative authority the [city] would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to some citizens of the city." Williamson v. High Point, 243 N.C. 96, 102 S.E. 2d 1. Its power to extend its lines and distribute electric current beyond its corporate boundaries is expressly restricted to "reasonable limitations."

[7,8] The primary function of a municipal corporation is to provide local government within its limits and authorized service to its inhabitants, not to engage in business enterprises for profit outside its corporate limits. See, Williamson v. High Point, supra. "The term, 'within reasonable limitations,' does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture." Service Co. v. Shelby, 242 N.C. 326, 115 S.E. 2d 12. An extension of a city's electric system, reasonable at the time of and under the circumstances prevailing in Criscoland v. Washington, supra, would not necessarily be reasonable in the present day under the circumstances disclosed in the record before us.

[9] In the present instance, the privately-owned utility, to which the territory has been assigned by the Utilities Commission "in accordance with public convenience and necessity," had its service lines in the immediate vicinity of the Colony Apartments and was ready, able and willing to serve Colony. There is nothing to indicate that its service will not be adequate. Both its service and its rates are subject to regulation by the Utilities Commission. Neither the service nor the rates of the city are subject to regulation by any agency other than the city itself. G.S. § 62-3(23)(d). G.S. § 160A-312; Dale v. Morganton, 270 N.C. 567, 155 S.E. 2d 1. Under these conditions, we conclude and hold that the extension by the city of its electric system across its city limits to serve Colony exceeds "reasonable limitations" and, therefore, is beyond the authority of the city.

While the Court of Appeals based its decision upon a construction of G.S. § 62-110.2, which we deem erroneous, its decision to reverse the judgment of the Superior Court was correct for the reason herein stated and will not be disturbed.

Affirmed.

STATE of North Carolina

v.

Billy HOLLOWELL.

No. 53.

Supreme Court of North Carolina.

April 10, 1967.

Defendant was convicted in the Superior Court, Duplin County, Bradley Tillery, J., of first-degree murder, and he appealed. The Supreme Court, Bobbitt, J., held that voir dire examination of prospec-

five jurors to explain their beliefs concerning capital punishment was proper and that imposition of death penalty did not constitute cruel and unusual punishment.

Affirmed.

Bobbitt, C. J., and Higgins and Sharp, JJ., filed a statement dissenting as to death sentence.

1. Criminal Law ⇐1111(3)

An appellate court is bound by record as to matters and evidentiary facts judicially know only what appears of record.

2. Jury ⇐107

In a criminal case, a juror may be properly challenged for cause if he indicates he cannot return a verdict of guilty knowing penalty could be death, even though State proved to him by the evidence and beyond reasonable doubt that accused was guilty of the capital crime charged.

3. Jury ⇐33(9)

Exclusion of veniremen opposed to capital punishment did not deny defendant who was charged with murder of an impartial and representative jury as guaranteed by the sixth amendment to the Constitution. U.S.C.A.Const. Amend. 6.

4. Jury ⇐33, 131(2), 135

Purpose of voir dire examination and exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to secure both defendant and State that persons chosen to decide guilt or innocence of accused will reach that decision solely upon evidence produced at trial.

5. Jury ⇐33(2)

Both the State and the defendant are entitled to a trial by an impartial jury. U.S.C.A.Const. Amend. 6.

6. Jury ⇐131(2)

Voir dire examination of prospective jurors in murder prosecution concerning jurors' moral or religious scruples, beliefs and attitudes toward capital punishment was proper and necessary to insure trial by an impartial and representative jury. U.S.C.A.Const. Amend. 6.

7. Homicide ⇐282

Question of whether defendant who stabbed wife was guilty of first degree murder was for jury.

8. Criminal Law ⇐1213

Imposition of death penalty upon conviction of first degree murder did not constitute cruel and unusual punishment in violation of Eighth Amendment to Federal Constitution. U.S.C.A.Const. Amends. 8, 14.

Defendant was charged in a bill of indictment, proper in form, with the first degree murder of Brenda Honeycutt. He entered a plea of not guilty.

The State offered evidence which tended to show the following: Prior to 6 June 1973, defendant, his wife Brenda Honeycutt and their nine year old daughter, Bobbie Jean Honeycutt, had lived in a trailer rented from J. D. Sheppard which was located about 200 feet from Mr. Sheppard's dwelling. On the date of Brenda Honeycutt's death, defendant and his family had been separated for about three weeks, and Brenda and Bobbie Jean had continued to live in the trailer. Shortly after midnight on the morning of 6 June 1973 Mr. Rose and Sheriff, at defendant's request, escorted defendant to the trailer occupied by his wife and child. Mr. Rose told Brenda Honeycutt that he had brought her husband to talk with her, and he replied "All right." Mr. Rose then departed.

Defendant's daughter testified that when defendant came into the trailer on the morning of 6 June 1973, he immediately started to call her mother ugly names and among other things told her, "If I can't have you, no man can." Following a prolonged argument defendant took a butcher

knife from his pants and stabbed her mother as she walked down the hall of the trailer. Her mother then told her to go out and get help. Billie Jean went to the Sheppard home and told them what had happened. She further testified that her mother had no gun or knife.

J. D. Sheppard stated that he was awakened by Billie Jean Honeycutt some time after midnight, and after talking with her he immediately called the Sheriff's Department. Later defendant came into his house and stated that he had killed his wife several times and he thought that she was dead. Billy Honeycutt appeared to be sober at that time.

Deputy Sheriff F. E. Pierce, of the Duplin County Sheriff's Department, testified that pursuant to a telephone call which he received at about 12:05 a. m. on 6 June he went to the trailer occupied by Brenda Honeycutt. He found her body lying on the floor of the trailer in a pool of blood. He found defendant on the premises and advised him of his rights. Defendant then asked if his wife was dead, and upon being told that she was dead the defendant said: "Hit, I'm glad of it."

Dr. Frank W. Jones, an assistant medical examiner, testified that he performed an autopsy on the body of Brenda Honeycutt on 7 June 1973. There were five stab wounds on the trunk of her body three being in front and two on the back. One of the wounds pierced her chest and passed through her right lung causing a hemorrhage which, in his opinion, was the proximate cause of her death.

There was other testimony to the effect that after his separation from his family, defendant had on at least three occasions told persons that he was going to kill his wife.

At the close of the State's evidence defendant moved for a directed verdict of not guilty. The motion was denied.

Defendant, testifying in his own behalf, stated that he and his wife had been separated for about three weeks before the date of her death. He left home to try to get a better job. During the night of 5 June 1973 and the early morning hours of 6 June 1973, he had been drinking beer and liquor. He was worried because he was separated from his family. He went to the trailer in the early morning hours of 6 June to talk to his wife and to make her see how much he loved her. He was not angry when he arrived at the trailer and he did not feel the liquor that he had consumed. Upon arrival, his wife told him that she did not intend to ever live with him again, and that she was going to take his clothes away to make sure that he would not see them again. He further testified that Brenda Honeycutt came out of the kitchen with a knife in her hands, and he struggled with her in an attempt to take the knife from her. He did not remember stabbing his wife, but he did remember seeing her on the floor. He had not planned to hurt his wife although he had, in a joking manner, made statements which might indicate that he intended to kill his wife.

Defendant offered no evidence other than his own testimony.

The jury returned a verdict of guilty of murder in the first degree. Defendant appealed from judgment sentencing him to death.

Atty. Gen. Robert Morgan by Asst. Atty. Gen. Thomas B. Wood and Associate Atty. Archie W. Anders, Raleigh, for the State.

Russell J. Lanier, Jr., Kenansville, for defendant appellant.

BRANCH, Justice.

Defendant by his first assignment of error contends that the jury selection process in this case deprived him of a truly representative and impartial jury as guaranteed by the Sixth Amendment to the United States Constitution.

Defendant seeks to support this assignment of error with several separate arguments.

The record contains only the following statement concerning jury selection:

"JURY SELECTION

It is stipulated and agreed by counsel for the defendant and the solicitor for the State, that the following questions are true and accurate questions asked by the State in the selection of the jury that tried Billy Honeycutt.

1. Do you have any moral or religious scruples about capital punishment?

2. On account of these moral or religious scruples, would it be impossible, under any circumstances, and in any event, for you to return a verdict of guilty as charged even though the State proves the defendant guilty beyond a reasonable doubt?

3. Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop at the trial?

4. You would not vote in favor of the death penalty under any circumstance, no matter how aggravated the case was and no matter what the facts were?

It is further stipulated and agreed that no objections were interposed at the time the above questions were asked the jury during the jury selection of this case. It is further stipulated and agreed that the defendant did not exhaust his peremptory challenges to the jury in the jury selection in this case.

EXCEPTION NO. 1

That the court erred in allowing the State's challenge for cause of jurors who had conscientious objections to capital punishment and who stated that their objection to capital punishment would not allow them to return a guilty verdict in this case."

[1] This record does not disclose the answers given by any juror. Neither does it reveal that any juror was excused for cause because of his opposition to capital punishment. An appellate court is bound by the record as certified and ordinarily can judicially know only what appears of record. 1 N.C.Index 2d, Appeal and Error § 42.

Our consideration of this assignment of error must therefore be limited to the effect of the inquiries to prospective jurors concerning their views on capital punishment.

[2] We find no merit in defendant's contention that a juror cannot be excused under any circumstances because of his convictions concerning capital punishment. It is now well established that in a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, reh. den. 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186; State v. Washington, 283 N.C. 175, 195 S.E.2d 534; State v. Cook, 280 N.C. 642, 187 S.E.2d 104; State v. Frazier, 280 N.C. 141, 185 S.E.2d 652; State v. Dees, 279 N.C. 413, 183 S.E.2d 671; State v. Sanders, 276 N.C. 568, 174 S.E.2d 487.

[3] Defendant further contends that excluding veniremen opposed to capital punishment denied him an impartial and representative jury. He argues that polls and studies establish that a large part of contemporary society has some scruples about capital punishment and that employing a jury selection process which excludes such persons does not reflect a "cross section of the community" and is impermissible. He specifically contends that a jury without scrupled jurors is unbalanced or weighted toward conviction.

The United States Supreme Court addressed this same question in Witherspoon

v. Illinois, *supra*. There the defendant contended that such a jury, unlike one chosen at random from a cross section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the State's version of the facts and return a verdict of guilty.

After considering surveys cited by defendant in his brief, the Court in Witherspoon said:

". . . We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was."

In instant case petitioner presents the same argument without additional evidence or authority. Logic and the weight of authority require that we reject the argument.

Defendant argues that in capital cases there should be no voir dire examination of prospective jurors.

[4] The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759; Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; State v. Spence, 274 N.C. 536, 164 S.E.2d 393.

[5] Defendant's arguments in support of this assignment of error run counter to the well recognized principle that both the State and the defendant are entitled to a trial by an impartial jury. Tuberville v. United States, 117 U.S.App.D.C. 1, 303 F.2d 411, cert. den. 370 U.S. 916, 82 S.Ct. 1557, 8 L.Ed.2d 813; State v. Childs, 269 N.C. 307, 152 S.E.2d 453.

In the recent case of State v. Crowder, N.C., 203 S.E.2d 38, we find the following pertinent statement:

"In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment."

[6] Here, the questions asked the prospective jurors by the Solicitor were permissible under both Federal and State decisions, and were necessary to insure trial by an impartial and representative jury.

This assignment of error is overruled.

[7] Although assigned as error, defendant does not argue in his brief that the Court erred in denying his motion for a directed verdict of not guilty. We think it sufficient to say that the trial judge properly denied defendant's motion since there was ample, substantial evidence of every essential element of the crime of murder in the first degree to carry the case to the jury.

[8] Finally, defendant contends that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

This Court has declared that upon conviction any person who commits the crime of burglary in the first degree, first degree murder, arson or rape after 18 January 1973 shall suffer the penalty of death. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19. We fully considered the constitution-

alty of the death sentence in light of the Eighth and Fourteenth Amendments to the United States Constitution in the case of State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, and thus reaffirmed the holding of *Waddell*. See also State v. Noell, 284 N.C. 670, 202 S.E.2d 750, State v. Dillard, N.C., 203 S.E.2d 6, State v. Henderson, N.C., 203 S.E.2d 10, State v. Crowder, *supra*. The holdings in *Waddell*, *Jarrette*, *Noell*, *Dillard*, *Henderson* and *Crowder* control this assignment of error.

This assignment of error is overruled.

Examination of each assignment of error, every argument offered to counsel for defendant and a careful review of the entire record disclose that defendant has received a fair trial, free from prejudicial error.

No error.

BOBBITT, C. J., and HIGGINS and SHARP, JJ., dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 747 (1974).

STATE of North Carolina

v.

Jack Edward SYKES.

No. 56.

Supreme Court of North Carolina.

April 10, 1974.

Defendant was convicted in Superior Court, Wayne County, Perry Martin, J., of driving while under the influence of intoxicating liquor. The Court of Appeals, 20 N.C.App. 467, 201 S.E.2d 514, found no error and defendant appealed. The Supreme Court, Huskins, J., held that officer's asking defendant, who had been observed driving erratically, if defendant had been drinking, did not constitute custodial interrogation, and fact that defendant had not been warned of his rights to remain silent and to have counsel did not render statement inadmissible; and that defendant's statement to arresting officer, prior to being advised of his statutory rights, that he would take breathalyzer test did not render test results inadmissible where defendant was informed of his rights prior to taking the test.

Affirmed.

1. Criminal Law ⇐412.2(3)

Warnings as to right to remain silent and to have counsel are required when, and only when, the defendant is being subjected to custodial interrogation.

2. Arrest ⇐63, 67

The time and place of an arrest is determined in the context of the circumstances surrounding it.

3. Criminal Law ⇐412.2(2)

Officer's asking defendant, who had been observed driving erratically, if defendant had been drinking, did not constitute "custodial interrogation," and fact that defendant had not been warned of rights to remain silent and to have counsel did not render incriminating statement inadmissible. G.S. § 20-16.2(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Arrest ⇐70

One who is detained by police officers under a charge of driving under the influence of an intoxicant has the same constitutional and statutory rights as any other accused. G.S. § 20-16.2(a).

5. Criminal Law ⇐338

Admission of results of breathalyzer test administered to motorist is not depend-